Bank Industri (M) Bhd v Technopro Corp (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-1375 OF 1990
KAMALANATHAN RATNAM J
21 AUGUST 1998

Banking *— Banks and banking business — Development finance business — Whether business of plaintiff conforms with definition of 'development finance business' in s 2 of BAFIA — Whether loans granted were illegal — Banking and Financial Institutions Act 1989*

Moneylenders *— Exemption under s 2(e) of the Moneylenders Ordinance 1951 — Whether applicant must take action to ensure gazetting of exemption — Whether presumption that judicial and official acts have been regularly performed applied — Evidence Act 1950 s 114(e)*

The plaintiff — a limited company registered under the Companies Act 1965 and a non-commercial bank administering funds received from foreign institutions — granted a fixed loan facility from the World Bank and an import trade financing facility from the Islamic Development Bank ('IDB') to the first defendant. The plaintiff brought an action against the second defendant as a guarantor for the loans. The second defendant contended that the loans granted were illegal on the ground that: (i) although the plaintiff had applied for an exemption under s 2(e) of the Moneylenders Ordinance 1951 and the Ministry was agreeable to granting the exemption sought, the plaintiff did not take any action to ensure the gazetting of the exemption. Therefore, there was no proper exemption and the plaintiff could not escape from being labelled a moneylender; and (ii) the loans were not licensed under the Banking and Financial Institutions Act 1989 ('the BAFIA').

Held, allowing the plaintiff's claim:

(1) There was clear undertaking by the Ministry to ensure that the notification was gazetted. In any case, no evidence was led by the second defendant to establish that the exemption was not gazetted. In the circumstances, the court invoked s 114(e) of the Evidence Act 1950 and raised the presumption that judicial and official acts have been regularly performed. Since the gazetting is a judicial requirement, it must be presumed until the contrary is shown that the Minister would have ensured that his official act of gazetting the exemption must have been effected (see p 758F–G).

(2) The development finance business which Bank Negara permitted the plaintiff to engage in was one of the 'scheduled businesses' as found in the Third Schedule to the BAFIA. The plaintiff had the mandate from Bank Negara and the relevant Ministry to carry on this business. Therefore, the business of the plaintiff conformed

with the definition of 'development finance business' in s 2 of the BAFIA. As such, the second defendant's submission on illegality was totally devoid of merit. Furthermore, although the provision of financial facilities to the first defendant as guaranteed by the second defendant occurred prior to the enactment of the BAFIA, it would mean that the plaintiff was in any case exempted under the Moneylenders Ordinance 1951 (see pp 759C, G–I and 760A).

(3) The plaintiff's claim against the second defendant related to the guarantees that he signed in favour of the plaintiff for the use of the facilities and in this regard any agreement and/or agency agreement between the plaintiff and IDB was irrelevant. Surely, the source of a financial institution's lawful fund is not the concern of borrowers and their guarantors. The plaintiff did not issue the guarantee facilities as the agent of IDB (see p 760G–H).

(4) The second to fifth defendants as directors of the first defendant had executed letters of guarantee in favour of the plaintiff for the facilities provided, jointly and severally guaranteeing as principal debtors, the obligation of the first defendant to the plaintiff. In the circumstances, the second defendant's obligations are co-extensive with that of the first defendant (see p 761B–C).

[**Bahasa Malaysia summary**

Plaintif — sebuah syarikat berhad yang berdaftar di bawah Akta Syarikat 1965 dan sebuah bank bukan komersil yang mentadbirkan dana-dana yang diterima daripada institusi-institusi asing — memberikan kemudahan pinjaman tetap daripada Bank Dunia dan kemudahan pembiayaan perdagangan import daripada Bank Pembangunan Islam ('BPI') kepada defendan pertama. Plaintif telah memulakan satu tindakan terhadap defendan kedua sebagai penggerenti pinjaman-pinjaman tersebut. Defendan kedua menghujahkan bahawa pinjaman-pinjaman yang diberikan adalah tak sah atas alasan bahawa: (i) walaupun plaintif telah memohon untuk mendapatkan pengecualian di bawah s 2(e) Ordinan Pemberipinjam Wang 1951 dan Kementerian bersetuju untuk memberikan pengecualian yang dipohon, plaintif telah tidak mengambil sebarang tindakan bagi memastikan pengecualian tersebut diwartakan. Dengan yang demikian, tidak terdapat pengecualian yang wajar dan plaintif tidak dapat lari daripada dilabelkan sebagai pemberi pinjaman wang; dan (ii) pinjaman-pinjaman tersebut tidak dilesenkan di bawah Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK').

Diputuskan, membenarkan tuntutan plaintif:

(1) Terdapat akujanji yang nyata oleh Kementerian bagi memastikan bahawa pemberitahuan itu diwartakan. Walau bagaimanapun, tiada keterangan telah diberikan oleh defendan kedua untuk menentukan bahawa pengecualian tersebut telah tidak diwartakan.

Dalam keadaan tersebut, mahkamah telah menggunakan s 114(e) Akta Keterangan 1950 dan membangkitkan tanggapan bahawa perbuatan-perbuatan kehakiman dan rasmi telah dilaksanakan dengan teratur. Oleh kerana perwartaan adalah kehendak kehakiman, ia semestinya dijangkakan sehingga perkara yang sebaliknya ditunjukkan bahawa Kementerian telah memastikan bahawa tindakan rasminya mewartakan pengecualian tersebut pastinya telah dikuatkuasakan (lihat ms 758F–G).

(2) Perniagaan pembiayaan pembangunan yang dibenarkan oleh Bank Negara kepada plaintif supaya dikendalikan adalah salah satu 'perniagaan-perniagaan terjadual' sepertimana yang terdapat dalam Jadual Ketiga ABIK. Plaintif mempunyai mandat daripada Bank Negara dan Kementerian yang berkenaan untuk menjalankan perniagaan ini. Dengan itu, perniagaan plaintif adalah selaras dengan takrifan 'perniagaan pembiayaan pembangunan' dalam s 2 ABIK. Oleh yang demikian, hujah defendan kedua mengenai kepenyalahan undang-undang adalah sesungguhnya tidak bermerit. Tambahan pula, walaupun peruntukan kemudahan-kemudahan kewangan kepada defendan pertama sepertimana yang dijamin oleh defendan kedua telah berlaku sebelum penggubalan ABIK, ia akan bermakna bahawa plaintif adalah dalam sebarang keadaan dikecualikan di bawah Ordinan Pemberipinjam Wang 1951 (lihat ms 759C, G–I dan 760A).

(3) Tuntutan plaintif terhadap defendan kedua berkaitan dengan gerenti-gerenti yang telah beliau tandatangani atas nama plaintif untuk menggunakan kemudahan-kemudahan tersebut dan sehubungan dengan perkara ini sebarang perjanjian dan/atau perjanjian ejensi antara plaintif dan BPI adalah tak relevan. Sudah pasti, sumber dana sah institusi kewangan bukannya urusan peminjam-peminjam dan penggerenti-penggerenti mereka. Plaintif telah tidak mengeluarkan kemudahan-kemudahan gerenti tersebut sebagai ejen BPI (lihat ms 760G–H).

(4) Defendan-defendan kedua hingga kelima sebagai pengarah-pengarah defendan pertama telah menyempurnakan surat-surat gerenti atas nama plaintif untuk kemudahan-kemudahan yang diberikan, menggerentikan secara bersesama dan berasingan sebagai penghutang utama, kewajipan defendan pertama kepada plaintif. Dalam keadaan yang sedemikian, kewajipan defendan kedua adalah sama ekstensif dengan kewajipan defendan pertama (lihat ms 761B–C).]

Notes

For cases on banks and banking business, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1063–1138.

For cases on moneylenders, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 385–534.

Cases referred to

Bank Industri Malaysia Bhd v Huston Electronics Co (M) Sdn Bhd & Ors [1997] 1 MLJ 818 (refd)

Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 2, Third Schedule
Companies Act 1965
Evidence Act 1950 s 114(e)
Moneylenders Ordinance 1951 s 2(e)

Terrence Marbeck (*Shahbudin Sheikh Alaudin* and *Aznim Azahar* with him) (*Tengku Mohamed & Alan Lim*) for the plaintiff.

James Selva (*Ong Kok Bin & Co*) for the second defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

The parties

The plaintiff is a limited company registered under the Companies Act 1965. It is not a commercial bank. It was established in 1977 and was formerly known as Bank Kemajuan Perusahaan Malaysia Bhd. The plaintiff administers funds received from foreign institutions like the World Bank and the Islamic Development Bank ('IDB'). The second defendant is a promoter of the first defendant.

The second, third, fourth and fifth defendants as directors of the first defendant executed two letters of guarantee dated 7 and 16 December 1988 in favour of the plaintiff for the facilities provided, and jointly and severally guaranteed, as principal debtors, the obligations of the first defendant to the plaintiff. The first was a fixed loan facility of RM200,000 from the World Bank for the purchase of machinery. The second was an import trade financing facility of US$100,000 from the IDB for the purchase of raw materials.

The claim

The plaintiff's claim is against the second defendant as a guarantor pursuant to facilities granted to the first defendant.

Are the loans granted illegal?

The second defendant took the issue that the loans granted were illegal. He argued that this issue of illegality only arose 'based on the evidence adduced during trial'. In his defence he contended that to his knowledge

the plaintiff was only exempted from the Moneylenders Ordinance 1951 and that the said exemption commenced on 22 August 1979 and ended on 21 August 1991. He also submitted that in 1988 the plaintiff was not licensed under the Banking and Financial Institutions Act 1989 ('the BAFIA').

The Moneylenders Ordinance 1951

I am satisfied, on an examination of CABD 189 that the said letter dated 31 May 1986 and addressed to the plaintiff clearly states that pursuant to an application made by the plaintiff under s 2(e) of the Moneylenders Ordinance 1951, the Minister of Home and Local Government was agreeable to granting the exemption sought. The said letter was signed by the Chief Secretary to the Ministry. Section 2(e) defines moneylenders as including every person whose business is that of moneylending but does not include any body corporate or society for the time being exempted by the Minister by notification published in the Gazette from the provisions of the Ordinance. I also note that the Ministry undertook, in that same letter, to gazette the exemption as soon as possible (secepat mungkin). It was the submission of Mr James Selva for the second defendant that since the plaintiff's witness ('PW1') had in answer to a question in cross-examination stated that the plaintiff did not take any action after receiving the letter dated 31 May 86, presumably to ensure the gazetting of the exemption, there is in effect no proper exemption and that the plaintiff cannot escape from being labelled a moneylender. I reject this submission. There was a clear undertaking by the Ministry to ensure that the notification was gazetted. In any case, no evidence was led by the second defendant to establish that the said exemption was not gazetted. In the circumstances, I invoke s 114(e) of the Evidence Act 1950 and raise the presumption that judicial and official acts have been regularly performed. Since the gazetting is a judicial requirement, it must be presumed until the contrary is shown that the Minister would have ensured that his official act of gazetting the exemption must have been effected.

Banking and Financial Institutions Act 1989 (BAFIA)

The next issue on illegality is that the loans were not licensed under the BAFIA. The second defendant referred me to CABD 190 which was a letter from Bank Negara dated 31 March 1990 and addressed to the plaintiff. It reads:

> Re: Acknowledgment of compliance with s 21(1) of the Banking and Financial Institutions Act 1989
>
> We hereby acknowledge that your institution has complied with the requirements of s 21(1) of the Banking and Financial Institutions Act 1989 in respect of the following scheduled business(es) carried on by your institution:
>
> DEVELOPMENT FINANCE BUSINESS

A The second defendant submitted that this restricted licence does not permit the plaintiff to carry on the business as stated in s 4 of the BAFIA which reads:

> No person shall carry on —
>
> (a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or
>
> B (b) money-broking business, unless it is a corporation,
>
> and holds a valid licence granted under section 6(4) to carry on such business.

In fact, the development finance business which Bank Negara permitted the plaintiff to engage in is one of the 'scheduled businesses' as found in C the Third Schedule to the BAFIA. Whilst I was referred to numerous sections of the BAFIA and given a didactic exposition, with numerous case reference, to the law relating to interpretation of statutes and in particular as to when an Act is to be considered as prospective or retrospective, neither side referred me to s 2 of the BAFIA which defines 'development D finance business' as:

> (a) the business of providing capital or other credit facility on terms which would require the same to be utilized for industrial, agricultural, commercial or other economic development; and for the purpose of this definition, 'development' includes the commencement of any new industrial, agricultural, commercial or other economic venture or the E expansion or improvement of any such existing venture; or
>
> (b) such other business as the Bank, with the approval of the Minister, may prescribe.

The memorandum of association of the plaintiff which was included in the common agreed bundle of documents clearly shows that one of the F objectives of the plaintiff is to carry on the business of banking in order to promote the economic and social development and to assist enterprises in Malaysia. The plaintiff was formed with this objective in mind. It had the mandate from Bank Negara and the relevant Ministry to carry on this business. Further, the line of import trade financing agreement signed G between the plaintiff and the Islamic Development Bank, Jeddah on 26 August 1988 was also exhibited as an agreement, and admitted to by both parties. The first preamble to the said agreement reads that the Government of Malaysia had requested IDB to extend to the plaintiff a line of import trade financing and on this basis the IDB had agreed to extend financing up to US$10m. Out of this facility the first defendant H borrowed a sum of US$100,000 from the plaintiff by signing the guarantee facility agreement on 22 September 1988. Subsequently by a debenture dated 21 October 1988 the first defendant again borrowed from the plaintiff the sum of RM200,000.

The second defendant's submission on illegality is totally devoid I of merit.

Although the provision of financial facilities to the first defendant as guaranteed by the second defendant occurred prior to the enactment of

the BAFIA, it would mean that the plaintiff is in any case exempted under the Moneylenders Ordinance 1951. A

No case to answer

After the plaintiff had called witnesses and closed its case, the second defendant opted to submit that he had no case to answer after I had put him to his election. In my book *Nathan on Negligence* (1st Ed, 1998), I said this at p 267 with regard to a submission of no case to answer: B

> In any case, if a defendant elects not to call evidence he is bound by that election. However he must be permitted to make a final address. The court would have to hear the evidence of the other defendants and their witnesses and their submission, including the submission of the party making the election before determining whether the plaintiff had made out a case against any of the defendants. Cross-examination would not constitute the calling of evidence and the party making the election is not precluded from cross-examining the other defendants and their witnesses. A defendant is not under an obligation to give evidence but he cannot complain if, on a narrow balance of probability the evidence justified, the court in drawing the inference of negligence against him. C D

Findings of the court

The plaintiff had already obtained judgment for the sum of RM411,704.74 against the first, third and fourth defendants. These judgments have not been set aside. The action against the fifth defendant, who remains outside the jurisdiction of this court, has been discontinued. There is no doubt that financial facilities were provided for the benefit of the first defendant which were guaranteed by the second defendant who was indeed in charge of the first defendant's operations. Pursuant to the judgment, the sum of RM411,704.74 (as at 17 April 1990) is due to the plaintiff which had provided two financial facilities for the benefit of the first defendant, namely a term loan of RM200,000 and a guarantee facility for a sum of up to US$100,000. The plaintiff's claim against the second defendant relates to the guarantees that he signed in favour of the plaintiff for the use of these facilities and in this regard it is my judgment that any agreement and/or agency agreement between the plaintiff and IDB is irrelevant. Surely the source of a financial institution's lawful funds is not the concern of borrowers and their guarantors. The plaintiff did not issue the guarantee facilities as the agent of IDB. E F G H

I find that the sum of RM411,704.74 has, pursuant to P1 — being the statement of accounts and the conclusive evidence — risen to RM578,716.64, since the second defendant did not elect to give evidence to refute this. In fact in *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556, I had held that the presence of a conclusive evidence clause per se could not prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them. But in this case the second defendant gave no evidence on his behalf. As I said in *Bank Industri* I

Malaysia Bhd v Huston Electronics Co (M) Sdn Bhd & Ors [1997] 1 MLJ 818, if the conclusive evidence clause was to be disputed, then there ought to be a proper challenge taken since the existence of such a clause was prima facie evidence of the debt due. The second to fifth defendants as directors of the first defendant had executed letters of guarantee dated 7 and 16 December 1988 in favour of the plaintiff for the facilities provided, jointly and severally guaranteeing as principal debtors, the obligation of the first defendant, to the plaintiff. In the circumstances, I find that the second defendant's obligations are co-extensive with that of the first defendant. The second defendant admitted in the defence that he executed the letters of guarantee of 7 and 16 December 1988.

The second defendant contends that the plaintiff failed to disburse the IBD loan of RM200,000, that the first defendant did not default in its payments to the IDB and in its loan repayments to the plaintiff, and that for the sum of RM200,000 the consideration is past. I hold that these submissions are nothing more than a shot in the dark, bound in all certainty, to miss the mark. By a resolution dated 16 January 1990 (CABD 251), the first defendant's directors had resolved that certain equipment be sold to repay the plaintiff for the amounts overdue on the term loan of RM200,000. This document I find is a clear admission of liability and renders ineffectual the submission of past consideration.

PW2, Azijan bin Sipon, has explained the nature of the transactions, identified the second defendant's signature on the letters of guarantees and undertaking and has clearly stated that the second defendant did not object to executing them. He also testified that the second defendant was in charge of the first defendant's business and its operations and that the plaintiff did not receive any correspondence from the first defendant in regard to the conditions precedent.

PW3, Jamaludin bin Rahmat, a director and the largest shareholder of the first defendant had testified that he was aware of the financial facilities extended to the first defendant by the plaintiff; that the term loan of RM200,000 was disbursed; that the first defendant did draw upon the import trade financing facility of up to US$100,000 and that no repayments had been made. He also said that the second defendant who was in charge of the marketing entity for the first defendant's products took these products for sale without paying a single cent for them and that the first defendant's working capital came from the plaintiff's financial facilities and from him.

One final issue I have to consider. The second defendant made much of the fact that the first defendant was in fact assembling printed circuit boards and that the loans obtained were not for the manufacture of the printed circuit boards as contended by the plaintiff.

Whether the loans were to be utilized for the manufacture or for the assembling of the printed circuit boards, the fact remains that the said two facilities were indeed granted to the first defendant and guaranteed by the second defendant. The purpose for which the loans were to be used has become more of an issue, when it ought not to be so. In fact, the plaintiff's letter of offer of the term loan of RM200,000 to the first defendant dated

12 May 1988 states the purpose of the said loan as being 'To part finance the purchase of machinery and other fixed assets for the production of printed circuit board'. The word production can mean both assembling products and manufacturing products. Since manufacturing requires the obtaining of a licence and since no licence has in fact been obtained, the word production in the letter of offer must mean assembling and not manufacturing. If there was any other meaning to be attributed surely the second defendant could have given evidence to that effect.

I therefore give judgment to the plaintiff against the second defendant for the sum of RM578,716.64 with interest at the rate of 8% per annum from the date of judgment to the date of full settlement and costs. A date shall be fixed, as agreed, for the hearing of the counterclaim.

Order accordingly.

Reported by Jafisah Jaafar